86-66

No._____

Supreme Court, U.S.
FILED
JUL 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

KREEGER FARMS HOME DAIRY, INC.,
JOHN R. COOK d/b/a COOK'S FARM,
Petitioner,

vs.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE
OF THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JOHN BENJAMIN CARROLL, P.C.
JOHN BENJAMIN CARROLL
of Counsel
White Memorial Building
100 E. Washington Street
Syracuse, New York 13202
315-474-5356

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Questions Presented

I

Was the Circuit court correct in determining that this court in *INS v. Chadha 462 U.S. 919 (1983)*, intended to hold that Congressional rule making through legislation was exempt from the prohibitions of the bicameral and presentment clauses of the constitution and that the President's signature to such legislation may be regarded as "unnecessary".

II

Was the Circuit court correct in applying the Enrolled Bill Doctrine to this case and denying standing to sue and if so, are the Plaintiffs entitled to the exemption from that doctrine provided by *United States v. Ballin 144 U.S. 1*, for those directly and personally injured by actions of Congress.

III

Where the Lower Courts found that monetary assessments levied on residents of some States and not others was rational by reason of a single citation to a page in the Senate Report that contains not one word supporting the preference of citizens residing in Hawaii, Alaska and Puerto Rico over citizens residing in other States, has the contestive levy passed the outer limits of constitutionality fixed by this court in *Reed v. Reed 404 U.S. 71, (1971)* and the *United States v. Ptasynski 462 U.S. 74, 103 (1983)*.

TABLE OF CONTENTS.

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statutory Provisions	2
Constitutional Provisions	2
Statement of the Case	3
Argument	7
Legislative Veto	7
Discrimination Based on State Residence	9
Important Public Questions	11
Conclusion	12
Appendix:	
A. Decision and Order of the Circuit Court	1a
B. Decision and Order of the District Court	6a
C. Constitutional Provisions	26a
D. Statutory Provisions	28a
E. Letter from Hawaii Department of Agriculture showing Hawaii part of mature milk market	39a
F. Statistics of the Federal Milk Market Administration showing that the State of Alaska is a part of the national milk market	40a
G. Finding by Congress that the market for milk is a national market	42a
H. Finding by Congress that the levy was in aid of a national milk program	46a

Page

TABLE OF AUTHORITIES.

Colorado v. Connelly 106 S. Ct. 785 (1986)..... 11
Flint v. Stone Tracy Co. 220 U.S. 107, 143 (1911)... 9
INS v. Chadha 462 U.S. 919 (1983)..... i,4,7
Knowlton v. Moore 178 U.S. 41, 103-6 (1900) 10
Maldonado v. Block 769 F(2) 1st. Cir. July 1985.... 4
Reed v. Reed 404 U.S. 71 (1971) i,9
Texas Association of Concerned Tax Payers, Inc. v. United States No. 85-1262, 106 S. Ct. (1986) 9
United States v. Ballin 144 U.S. 1..... i,8,9
United States v. Ptasynski 462 U.S. 74, 103 S. Ct. 2239 (1983) i,9,10

STATUTES.

Congressional and Impoundment Act of 1974, P.L. 93-344; 88 Stat. 297; Title 2 U.S.C.:
Section 303..... 3
Section 621 *et seq.* 2
Dairy and Tobacco Adjustment Act of 1983, P.L. 98-180; Nov. 29, 1983; Stat. 1128; 7 U.S.C.:
Section 102(a); d(2) (a)(i)(ii)(B)(C)..... 2
Section 1446(a)(6)..... 3
Section 1446(d)..... 2

Page

CONSTITUTIONAL PROVISIONS.

Article I Section 1 2
Article I Section 5(3) 2
Article I Section 7 (2) and (3) 2
Fifth Amendment 2

IN THE

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JOHN R. BLOCK, SECRETARY OF AGRICULTURE
OF THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The United States Court of Appeals for the District of Columbia Circuit to review that Court's Judgment entered in this matter on April 23, 1986.

Opinions Below

The opinion of the Court of Appeals is unreported. It appears as Appendix A at page 1a. The decision of the United States District Court for the District of Columbia is unreported. It appears as Appendix B at page 6a.

Jurisdiction

The Judgment of the Court of Appeals was entered on April 23, 1986. This court has jurisdiction under 28 U.S.C. 1254 (1).

Jurisdiction in the court below was sought under Title Sections 1331, 1337, 2201 and Rule 65 of the Federal Rules of Civil Procedure, and the Equity jurisdiction of the Court.

Statutory Provisions

The Statutory provision being challenged is the Dairy and Tobacco Adjustment Act of 1983 P.L. 98-180; Nov. 29, 1983; Stat. 1128; 7 U.S.C. 1446 (d); monetary levies are at section 102(a); d(2) (a)(i)(ii)(B)(C) and are set forth as Appendix D at page 36a.

The Congressional Budget and Impoundment Act of 1974, P.L. 93-344; 88 Stat. 297; Title 2 U.S.C. Sec. 621, et seq. is challenged as well at its legislative veto sections. This is set forth as Appendix D at page 28a.

Constitutional Provisions

The suit involves the following provisions of the Constitution: Article I Section 1; Article I Section 5(3); Article I Section 7 (2) & (3) and the Fifth Amendment to the Constitution. These are set forth as Appendix C at page 26a.

Statement of the Case

The Plaintiffs are farmers selling milk of their own production at retail in Michigan and Massachusetts. Sales are made within a few miles of their farm.

They commenced a Declaratory Judgment and Injunction proceeding seeking to review the constitutionality of the exercise of a congressional legislative veto over The Congressional Budget and Impoundment Act of 1974, and that act's monetary levies upon sales of their milk, in the District Court of the District of Columbia.

In this suit the Plaintiffs claimed among other claims that the Congress had cast a forbidden legislative veto in order to consider and vote upon the Dairy and Tobacco Adjustment Act of 1983 whose consideration was forbidden by Section 303 of the Congressional Budget and Impoundment Act of 1974 (Appendix D at page 32a) because there was no Joint Budget Resolution in place at the time of the consideration of the Dairy and Tobacco Adjustment Act of 1983 a spending and revenue measure in the particular objected to. These facts were conceded in the Lower Court.

The Plaintiffs further claimed that the Dairy and Tobacco Act of 1983 at 7 USC 1446 (a)(6) (Appendix G at page 42a) which provides that that act is not to apply to the noncontiguous states of the United States.

The effect of this clause was to leave in place a national dairy program based upon findings on national interrelationships in milk fully covering the offshore States but by the contested section the offshore areas were not to be involved in any monetary levies for the support and benefit of a dairy herd purchase program, nor subject to that program which was in turn in aid and assistance to the national program.

When taken together with the act's monetary levy of $.50 per cwt., the result was a levy of monetary assessments based upon the State of residence of the citizen.

The Plaintiffs maintained that the failure to levy an assessment upon similarly situated citizens in Hawaii and Alaska and Puerto Rico was unsupported by any finding and that all extrinsic evidence including findings of Congress that milk was in a national market (Appendix G at page 42a); that only 8 states of the United States were surplus in milk production (Appendix G at page 42a) and all others were similarly situated to Hawaii, Alaska and Puerto Rico. The Plaintiffs offered a letter from the Department of Agriculture of the State of Hawaii (Appendix E at page 39a) and federal market orter statistics (Appendix G at page 42a) supporting the Congressional finding that milk was in a national market of which these States were a part. The Plaintiffs cited the case of *Maldonado v. Block 769 F (2) 1st. Cir. July 1985* finding that Puerto Rico was also part of a national milk market.

The District Court ruling on question the Plaintiffs claim that *INS v. Chadha 462 U.S. 919 (1983)* forbade the veto cast by Congress held that the veto was an exercise of the rulemaking powers of Congress.

The Court Stated: (Appendix B at page 13a)

> "In effect the provisions governed Congress' internal procedures, a matter over which Congress' authority is plenary despite the fact that the President signed the legislation. See U. S. Const. Art. 1, Sec. 5, Cl. 2; *Christoffel v. United States 338 U. S. 84, 88 (1949);* Chadha, 462 U.S. at 995 N. 20. As distinguished from the internal Congressional procedures of the Budget and Impoundment Act,

> the legislation in Chadha involved a specific delegation of substantive authority to the Executive Branch whose exercise Congress attempted to invalidate."
>
> "The Plaintiffs claim was also defeated under the 'Enrolled Act Rule.' See *Marshall Field and Company v. Clark 143 U. S. 649, 672 (1892).* Under that doctrine the courts must accept the Dairy Amendments enactment as proper since its passage was attested by the Presiding Officers of the two Houses of Congress and signed into law by the President. See Mulroy 569 F. Supp. at 265-66 (quoting *Twin City v. Nebeer, 167 U. S. 196, 210 (1897).* The only inquiry permitted by the courts is into the substance of the law once attestation has occurred."

As to the Plaintiffs claim of political discrimination based on the State of Residence the court held (Appendix B at page 11a):

> "The rational basis for distinguishing between dairy producers within and without the continental United States is a regional difference in production and demand which are such that Alaska, Hawaii and Puerto Rico constitute separate milk markets. See S. Rep. No. 98-163, 57-58, 98th Cong., 1st Sess., Reprinted in 1983 U. S. Code Cong. & Ad. News 1665. Furthermore, the deduction provisions were enacted to finance the payments made to farmers who reduced their milk production below certain levels, payments which are available only to farmers in the continental United States. 7 U. S. C. Section 1446 (d) (6)."

On appeal to the Circuit Court the Plaintiffs maintained on the issue of legislative veto that the court had misread footnote 20 of Chadha and that the Supreme Court had not intended to allow vetos where either or both Houses engage in external interrelationships with

the other House or with the President that in fact the President had signed the legislation, which was captioned an Act (See Appendix A); that courts could not render the signature of the President upon legislation a nullity at will.

The Plaintiffs also maintained that since the District Court decision was solely based on a reference to the Senate Report it was not sustainable since that report contained not one word concerning Alaska, Hawaii, Puerto Rico or offshore States and was irrelevant (See Senate Report Page at Appendix G at page 42a).

The Circuit Court on the issue of legislative veto expressly affirmed the District Court's holding (Appendix A at pages 4a-5a) and held:

> "Congress' decision to engage in rulemaking through legislation presents a situation no different than if it had handled the matter internally. Indeed this is not the first time that Congress has provided for its internal procedures through legislation. See, e. g., *Christoffel v. United States 338 U. S. 84, 87-88 (1949)* (discussing the Legislative Reorganization Act of 1946, 60 Stat 812, 831). In essence the President's signature was unnecessary to those portions of the Budget Act affecting Congressional Rules."
>
> "Furthermore, we agree with the district court that the Plaintiff's claim is also defeated under the 'Enrolled Act Rule.' Slip op. at 8. Once a bill is authenticated by both Houses of Congress and signed by the President its legitimacy cannot be questioned by the judiciary. The respect due a coequal branch of government and the constitutional commitment of procedural affairs to the Congress preclude the judiciary from examining the method by which a bill has become law. See *Field v. Clark 143 U. S. 649, 672-73 (1982)* see also *Baker v. Carr 369*

U. S. 186, 214-15 (1962); Rainey v. United States 232 U. S. 310, 317 (1914); Flint v. Stone Tracy Co. 220 U. S. 107, 143 (1911)."

As to the second question of the levy of monetary payments based on the State of Residence the Circuit Court held that the question was of "little merit" and affirmed the Lower Court apparently based upon the Senate Report basis found by the District Court.

ARGUMENT

Legislative Veto

1. Certiorari should issue to interpret the meaning of *INS v. Chadha* (*supra*) at footnote 20 which states:

> "One might also include another 'exception' to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, 7, cls. 2, 3, and 5, cl. 2. However, this 'exception' only empowers Congress to bind itself and it's noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances."

That decision also states at 103 S. ct. 2785:

> "Amendment and repeal of statutes no less than an enactment must conform with Article I. (18)"

It seems clear by a plain reading of the language at footnote 20 of Chadha that so long as the House of Congress making the Rule does not involve the other House or the President in the process of making rules they are internal matters which may be changed at will but when the legislative process involving the other

House and the President is followed they become external in nature and cannot be changed except by the same process that went into their making that is presentment to the other House and the President.

Only this court can interpret the Chadha opinion and until it does so uncertainty will abound in an important area.

2. Certiorari should be granted also on the standing of the Plaintiffs to sue.

The first ground on which it should issue is that the courts below erred in not resolving the veto question by a normal and usual judicial investigation which does not invade the legislative province and which could have been done in this case.

The veto sections are contained in the Public Law. From this it can be determined whether the reservation of veto powers itself is illegal. If it is illegal then the Congressional Budget and Impoundment Act can be enforced as it stands.

Since it is conceded the Joint Budget Resolution was not in place at the time of consideration of the contested act, the Congress could not lawfully consider the measure, and the inquiry can be concluded and decision rendered.

Surely, no one can seriously assert that by a stroke of the pen the Speaker of the House or the Presiding officer of the Senate can prevent this court from carrying on its judicial function of determining the constitutionality of laws.

The second ground on which it should issue is that the decision of the circuit invoking the Enrolled Bill Doctrine is in tension with the *United States v. Ballin, 144 U. S.*

1, which holds that the doctrine does not apply where as here there is a direct personal and fundamental injury: "The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, . . .".

The third ground is that the holding of the Circuit Court is in tension with holdings of other circuits on challenges against the Tax Equity and Fiscal Responsibility Act of 1982 (See dissent of Mr. Justices White and Brennan and cases collected therein in *Texas Association of Concerned Tax Payers, Inc. v. United States No. 85-1262, 106 S. Ct. 1986).*

The fourth ground is that the decision is clearly in tension with this court's decision in *Flint v. Stone Tracy Co. 220 U. S. 107, 142-143, 31 S. ct. 342, 345 (1911)* adjudicating an origination clause challenge.

Discrimination Based on State Residence

3. Certiorari should also issue on the preference by residence question to correct the error of the Lower Courts in solely relying upon a citation to a Senate Report which on any reading does not support the exclusion of the States of Hawaii and Alaska and the Commonwealth of Puerto Rico. (See Appendix G at page 42a). Since the monetary levy is therefore left without any support as to rationality it must be deemed to be unconstitutional and thus forbidden, whether the levy be deemed an excise tax or an assessment pursuant to the Commerce Power (*United States v. Ptasynski 462 U. S. 74, 103 S. Ct. 2239 (1983)); (Reed v. Reed 404 U. S. 71, 75-76 (1971)).*

This court has held in *United States v. Ptasynski 462 U. S. 74, 103 S. Ct. 2239, 1983* through Mr. Justice Powell that both the commerce and tax powers were intended by the Framers of the Constitution to be subject to the constitutional restrictions forbidding political favoritism by State of Residence.

This court stated at page 2243, footnote 9 of that opinion:

> "The origins of the Uniformity Clause are linked to those of the Port and Preference Clause, Art. I, Sec. 9 C.6. the two were proposed together id. at 417-481, and reported out of a special committee as interrelated limitations on the national governments commerce power, Cid, at 437; *Knowlton v. Moore 178 U. S. 41, 103-106 (1900).*"

And the court further quoted Judge Story as saying:

> "(The purpose of the Clause) was to cut off all undue preferences of one state over another in the regulation subjects affecting their common interests."

The court further held that Congress could draw distinctions between similar classes provided that the levy is "uniform, i.e. when it operates with the same force and effect in every place where the subject of it is found" (page 244).

It is precisely this test which is not met by a monetary levy which skips and jumps over residents similarly situated and engaged in the same activity while landing on residents of another.

It follows that the determination of the Circuit Court is in tension with the aforesaid decision of this court and certiorari should issue.

Important Public Questions

4. Certiorari should issue by reason of the serious public issue involved in the Legislative veto question.

There are 22 provisions in statutes similar to Legislative veto provided in the Congressional Budget and Impoundment Act of 1974.

These are 2 USC Sec. 228 d (d); 2 USC Sec. 2889 (c); 5 USC Sec. 907; 5 USC Sec. 5305 (d); 15 USC Sec. 3417 (d); 16 USC Sec. 1434 (b)(4)(C); 16 USC Sec. 1823 (d); 16 USC Sec. 3233; 19 USC Sec. 1434; 19 USC Sec. 1862; 29 USC Sec. 1322 (d); 42 USC Sec. 2159 (h); 42 USC Sec. 6272 (n); 42 USC Sec. 6422 (d); 42 USC Sec. 7362 (d)(2); 42 USC Sec. 8722 (c)(4); 42 USC Sec. 8724 (f); 42 USC Sec. 8725 (d)(2); 42 USC Sec. 10135 (e); 50 USC Sec. 1622; 50 USC Sec. 1941 (4); 50 USC Sec. 2097 (c).

This illustrates the large number of matters affected by the Circuit Court decision and the important nature of the relationships between the President and the Congress which can only be settled finally by this court.

As a matter of policy it ought to be important to end any possible uncertainty concerning such important relationships.

Further the Congress and President ought to know the limits of Congressional dependability as a budgetary partner and whether if ever under our system budgetary matters can be planned on a dependable programmed basis.

The public interest in discrimination based on residence is obvious.

While the Plaintiffs are small, the issue they carry is not. This court held in *Colorado v. Connelly 106 S. Ct. 785 (1986):*

> "But even matters of small effect can cloak issues of great moment."

Conclusion

For the above reason certiorari should be granted.

Respectfully submitted,

JOHN BENJAMIN CARROLL, P.C.
JOHN BENJAMIN CARROLL
of Counsel
White Memorial Building
100 E. Washington Street
Syracuse, New York 13202
315-474-5356

APPENDIX A

Decision and Order of the Circuit Court

Not to be Published - See Local Rule 8(f)

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 85-5896

September Term, 1985
Civil Action No. 84-02003

Kreeger Farms Home Dairy, Inc., *et al.*,
Appellants,

vs.

John R. Block, Secretary of Agriculture.

Appeal from the United States District Court
for the District of Columbia

Before: MIKVA, GINSBURG, and BUCKLEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel for appellants and appellee. While the issues presented occasion no need for an opinion, they have been accorded

full consideration by the Court. *See* Local Rule 13(c). On consideration thereof, and for the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court
GEORGE A. FISHER
George A. Fisher
Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

United States Court of Appeals
for the District of Columbia Circuit
Filed Apr 23 1986
George A. Fisher
Clerk

Appendix A—Decision and Order of the Circuit Court.

MEMORANDUM

Plaintiffs challenge the constitutionality of the Dairy Production Stabilization Act of 1983, Title I of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128, relevant portions codified at 7 U.S.C. §1446 ("Dairy Act"). Plaintiffs contend that the Dairy Act violates the equal protection, uniformity, taking and commerce clauses of the Constitution. We find very little merit in these claims. The district court correctly granted defendant judgment on the pleadings.

We are a bit more troubled by plaintiffs' contention that the Dairy Act was the product of an improper legislative veto. Although we are certain that no fatal infirmity inheres in the Dairy Act, a brief discussion of the plaintiffs' challenge is appropriate.

Title IX of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 330 ("Budget Act"), amended the rules of the House and the Senate. These amendments related especially to the procedures under which Congress was to consider and pass budget legislation such as the Dairy Act. The Budget Act made explicit, however, that its provisions relating to congressional rules were enacted "as an exercise of the rulemaking power of the House . . . and the Senate" and that those provisions were enacted "with full recognition of the constitutional right of either House to change such rules." *See* Budget Act §904(a), 88 Stat. at 331. Thus it was that the Dairy Act, rather than being considered according to the procedures provided in the Budget Act, was considered and enacted under new procedures adopted by the House. Plaintiffs contend that the House's action in adopting procedures different from those provided for in the Budget Act was an exercise of an impermissible legislative veto. The plaintiffs rely on

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). In *Chadha* the Supreme Court held that the bicameral and presentment clauses of the Constitution must be complied with when Congress takes legislative action.

However, in *Chadha* the Supreme Court specifically acknowledged that Congressional procedure is constitutionally committed to the discretion and control of the Congress. *See Chadha*, 462 U.S. at 956 n. 21. Legislative procedure is an internal affair of the Congress and need not be provided for through legislation. Thus, the district court was correct to say that "internal procedures [are] a matter over which Congress' authority is plenary despite the fact that the President signed the legislation." *Kreeger Farms Home Dairy, Inc. v. Block*, Civ. Act. No. 84-2003 (D.D.C. Jul. 30, 1985), slip op. at 7. The plaintiffs' contention here—that because the Congress had provided for legislative procedure through legislation it was obliged to change those procedures only through legislation—is incorrect in the circumstances of this case.

Here the procedures adopted in the Budget Act were specifically intended to be an exercise of Congress' rulemaking power. That Congress chose to adopt these rules through legislation does not alter their nature or the judiciary's authority to supervise Congress' functioning. Congress' decision to engage in rulemaking through legislation presents a situation no different than if it had handled the matter internally. Indeed, this is not the first time that Congress has provided for its internal procedures through legislation. *See, e.g., Christoffel v. United States*, 338 U.S. 84, 87-88 (1949) (discussing the Legislative Reorganization Act of 1946, 60 Stat. 812, 831). In essence, the President's signature

was unnecessary to those portions of the Budget Act affecting congressional rules.

We note, however, that we are not confronted with the question of whether Congress may bind itself to certain procedures by enacting legislation which does not recognize the special constitutional nature of congressional rules. That is, we do not address the possibility that one Congress through legislation could set rules for a later Congress that might be changed only through legislation. We have grave doubts whether such a procedure would be permissible and whether, in any event, the question would properly be resolved by the judiciary.

Furthermore, we agree with the district court that "[t]he plaintiffs claim also is defeated under the 'enrolled act rule.' " Slip op. at 8. Once a bill is authenticated by both Houses of Congress and signed by the President its legitimacy cannot be questioned by the judiciary. The respect due a coequal branch of government and the constitutional commitment of procedural affairs to the Congress preclude the judiciary from examining the method by which a bill has become law. *See Field v. Clark*, 143 U.S. 649, 672-73 (1892); *see also Baker v. Carr*, 369 U.S. 186, 214-15 (1962); *Rainey v. United States*, 232 U.S. 310, 317 (1914); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911).

Thus, we conclude that insofar as we are permitted to reach the question, the Dairy Act was enacted in accordance with the Constitution. The plaintiffs' legislative veto argument is ingenious but unavailing. No impediment exists to Congress providing rules for itself through legislation. Nor do such rules enjoy any special involiability. Moreover, the enrolled act doctrine precludes us from examining the underlying process by which the Dairy Act became law.

APPENDIX B

Decision and Order of the District Court

UNITED STATES DISTRICT COURT
For the District of Columbia

Civil Action No. 84-2003.

KREEGER FARMS HOME DAIRY, INC., and
JOHN COOK, d/b/a COOK'S FARM,
Plaintiffs,

vs.

JOHN R. BLOCK,
Secretary of Agriculture,
Defendant.

Filed
Jul 30 1985
Clerk, U.S. District Court
District of Columbia

MEMORANDUM OPINION AND ORDER

This action now is before the Court on the motion of the defendant Secretary of Agriculture for judgment on the pleadings. The Court concludes that the 50 cents per hundredweight reduction in the $12.60 per hundredweight support price of milk is not unconstitutional. The Court further concludes that it was properly applied to the plaintiffs, two dairy farmers who pasteurize their milk on their farms and sell it at retail prices to customers near or on their farms. (Kreeger Farms is in Massachusetts; Cook's Farm is in Michigan.)

Since its enactment, the milk price support program has been modified several times. Each time, it has been challenged, in several instances by dairy farmers situated similarly to the plaintiffs. Many of the claims presented here have been presented and rejected previously by the several courts considering them. The Court, therefore, does not address a novel issue in this case, and shall not deal with the issues at length.

Facts

The plaintiffs own cows, land, processing plants, pasteurizing equipment, and delivery trucks. Their only commercial transactions are direct sales to consumers residing wholly within their respective states. Their class of retailers is known as producer-handlers of milk, whose sales constitute one percent of the milk sales in the United States. The plaintiffs do not sell milk at the wholesale level nor to any other dealer, cooperative, or to the Commodity Credit Corporation (CCC).

The CCC carries out the federal milk price support program, the administration for which the Secretary is responsible. The legislative history of the program has been recounted in relevant part in *Mulroy v. Block*, 569 F. Supp. 256, 259-61 (N.D.N.Y. 1983), *cert. denied*, 105 S.Ct. 907 (1985). At issue in *Mulroy* was the 1982 version of the program which did not include the "dairy diversion" provisions added in 1983 which are challenged here by the plaintiffs. Under the current program, the Secretary has established a floor price for milk of not less than $12.60 per hundredweight (cwt.). 7 U.S.C. §1446(d)(1)(B). The Secretary also established the diversion program which provides a subsidy to dairy farmers who reduce their milk production below specified

levels. *Id.* §1446(d)(3). The subsidies are financed through the collection of a 50-cent per cwt. deduction in the price of all milk produced and marketed commercially. *Id.* §1446(d)(2)(B). The diversion program applies only to the continental United States. *Id.* §1446(d)(6).

Claims Under the Commerce Clause

A commerce clause challenge involves two inquiries: whether the regulated activity affects interstate commerce and whether Congress had a rational basis for the regulatory scheme chosen. *See Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, 276 (1981); *Katzenbach v. McClung,* 379 U.S. 294 (1964). The 1982 version of the milk price support system has been upheld as a valid exercise of Congress' commerce clause authority. While not binding in this jurisdiction, the reasoning in *Mulroy* is persuasive. Therefore, the Court confines its analysis to the dairy diversion program. *See Mulroy,* 569 F. Supp. at 265.

Wickard v. Fillburn, 317 U.S. 111 (1942), resolved the question of Congress' authority under the commerce clause to regulate wholly intrastate activities that have either a direct or indirect effect on interstate commerce. In *Perez v. United States,* 402 U.S. 146, 154 (1971), the Supreme Court ruled that "where the class of activities is regulated and that class is within the reach of federal power. the courts have no power 'to excise, as trivial, individual instances' of the class." (Citations omitted.)

The plaintiffs' effect on interstate commerce arises from the sales of other farmers which they displace with their own sales. Other farmers, left without a sufficient market, send their milk to plants from which the CCC buys. The effect of displaced sales has been the

justification for congressional regulation of wholly intrastate milk since 1938. *See United States v. Rock Royal Corp.*, 307 U.S. 533, 568 (1938). That their contributions to the milk supply are relatively trivial does not exempt these particular milk producers because milk producers as a class are within Congress' power to regulate under the commerce clause.

The remaining inquiry is as to the rational basis for the enactment of the diversion program.[1] The program rewards those producing below specified levels. It makes those who produce above those levels pay for the benefit they receive from the lower supply of milk, *i.e.*, higher prices, by imposing the 50-cent levy upon them. All producers, including the plaintiffs, benefit from the artificially created lower supply of milk and higher prices created thereby. Thus, the diversion program is rationally related to the Congress' interests in controlling production, reducing government spending, and shifting the burden to those the system benefits.

The Court concludes that the plaintiffs' claims under the commerce clause are without merit since the plaintiffs' operations have an effect on interstate commerce and the dairy diversion program has a rational basis.

---

[1] The plaintiffs contend that the legislation must also fall because Congress held no hearings. No formal findings of fact are required for the valid exercise of the commerce clause power. *Katzenbach*, 379 U.S. at 299. Furthermore, hearings were held and findings were made. *See* S.Rep. No. 98-163, 98th Cong., 1st Sess., *reprinted in* 1983 U.S. Code Cong. & Ad. News 1665.

Appendix B—Decision and Order of the District Court.

Claims Under the Taking Clause

The plaintiffs maintain that the collection of the 50-cent price support deductions constitute an unlawful taking without compensation since they derive no benefit from the benefits from the program in the form of higher prices. As discussed above, they do receive benefits from the program in the form of higher prices. Furthermore, with regard to the deduction, the taking clause of the fifth amendment has no application where an adjustment of a government benefit is concerned. *See Kizas v. Webster,* 707 F.2d 524 (D.C. Cir. 1983), *cert. denied,* 104 S.Ct. 709 (1984). With regard to the collection of the deduction, the Supreme Court dealt with similar provisions in *Wickard.* There, the Court held that it "is hardly a lack of due process for the Government to regulate that which it subsidizes." 317 U.S. at 131. The collection is merely a means of regulation, and since the plaintiffs benefit from the high milk price support level established thereby, it is incongruous that they would argue their right to be free of any such regulation.

Equal Protection Claims

In their opposition to the motion, the plaintiffs claim that the deduction violates the equal protection clause of the fifth amendment because since the program extends to only 48 states, it "singl[es] out the Plaintiffs to pay for a public interest program, [it] regulat[es] the Plaintiffs as retailers and not other retailers, [and it] classif[ies] the Plaintiffs as retailers with wholesalers when the program is a wholesale price maintenance program, not retail."

The Court agrees with the defendant's characterization of the program as "pure economic regulation" without the

involvement of a fundamental interest or suspect class. Thus, the program must be upheld unless no rational basis exists for the classifications. *See Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

The rational basis for distinguishing between dairy producers within and without the continental United States is the regional differences in production and demand which are such that Alaska, Hawaii, and Puerto Rico constitute separate milk markets. *See* S.Rep. No. 98-163, 57-58, 98th Cong., 1st Sess., *reprinted in* 1983 U.S. Code Cong. & Ad. News 1665. Furthermore, the deduction provisions were enacted to finance the payments made to farmers who reduce their milk production below certain levels, payments which are available only to farmers in the continental United States. 7 U.S.C. §1446(d)(6). The rational basis for distinguishing between the plaintiffs and the general public and milk retailers is that the plaintiffs are producers and, as such, they receive the benefits of the milk price support system in sufficient measure to justify the regulation. The undergirding of the price of milk and the stabilization of the level of production enable the plaintiffs to receive a price for the product sufficient to keep them in business. Therefore, the plaintiffs' claims under the equal protection clause do not succeed.

Excise Tax Claim

In *Mulroy*, the plaintiff milk producer characterized the milk price system as a tax and challenged the system as an unconstitutional delegation of the taxing authority. The *Mulroy* court rejected that characterization, finding the dairy amendments to be an exercise of Congress'

power to regulate commerce. 569 F. Supp. at 261-62. The court quoted the Sixth Circuit which had stated:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943). The plaintiffs here again try to apply the characterization of an excise tax to the new 50-cent cwt. deductions in the milk price support. This time, however, they use the characterization as a means to challenge the non-uniformity of the deduction. They base this challenge on the constitutional provision that all "Excises shall be uniform throughout the United States." U.S. Const. art. 1, §8, cl. 1. Once again the plaintiffs' characterization and challenge must fail. The deduction is a regulatory measure, not a tax. Based on the conclusion that the deduction is not a tax, the exclusion of Alaska, Hawaii, and Puerto Rico is unimportant. *Cf. South Carolina v. Block,* 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied,* 104 S.Ct. 1444 (1984); *Mandel v. Block,* 573 F. Supp. 1522, 1528-29 (S.D.N.Y. 1983); *Mulroy v. Block,* 569 F. Supp. at 261.

Procedural Claims

The final contention made by the plaintiffs is that in enacting the deduction provisions Congress "exercised a retained legislative veto over the Budget and

Impoundment Act of 1974's Title III requirements." This, they contend, "is in violation of the Separation of Power provisions of the Constitution as recently determined by the Supreme Court."

The plaintiffs confuse the particular type of legislation involved here with that involved in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the case to which the plaintiffs refer. The provisions of title III are merely "an exercise of the rulemaking power of the House of Representatives and the Senate, respectively . . . with full recognition of the constitutional right of either House to change such rules . . . to the same extent as in the case of any other rule of such House." Budget and Impoundment Act of 1974, Pub. L. 93-344 tit. IX, §904(a)(1), (2). In effect, the provisions govern Congress' internal procedures, a matter over which Congress' authority is plenary despite the fact that the President signed the legislation. *See* U.S. Const. art. 1, §5, cl. 2; *Cristoffel v. United States*, 338 U.S. 84, 88 (1949); *Chadha*, 462 U.S. at 955 n.20. As distinguished from the internal congressional procedures of the Budget and Impoundment Act, the legislation in *Chadha* involved a specific delegation of substantive authority to the executive branch whose exercise Congress attempted to invalidate.

The plaintiffs claim also is defeated under the "enrolled act rule." *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892). Under that doctrine, the courts must accept the dairy amendment's enactment as proper since its passage was attested by the presiding officers of the two houses of Congress and signed into law by the President. *See Mulroy*, 569 F. Supp. at 265-66 (quoting *Twin City v. Nebeker*, 167 U.S. 196, 201 (1897)). The only inquiry permitted the Courts is into the substance of the law once attestation has occurred.

Appendix B—Decision and Order of the District Court.

Conclusion

For the foregoing reasons and upon consideration of the defendant's motion for judgment on the pleadings, the opposition thereto, and the reply, it hereby is

ORDERED, the motion is granted and the complaint is dismissed.

SO ORDERED.

STANLEY S. HARRIS
Stanley S. Harris
United States District Judge

Date: Jul 29 1985

Appendix B—Decision and Order of the District Court.

Complaint

UNITED STATES DISTRICT COURT
District of Columbia

Civil Action #_____.

KREEGER FARMS HOME DAIRY, INC.,
JOHN COOK, d/b/a COOK's FARM,
Plaintiffs,

vs.

JOHN R. BLOCK,
Secretary of Agriculture,
Defendant.

The Plaintiffs complaining of the Defendant allege and show to the Court as follows:

I

JURISDICTION AND VENUE

1. The Plaintiff, Kreeger Farms Home Dairy, Inc., is a duly incorporated corporation for the Kreeger family business in the State of Michigan with a principal place of business at Fowlersville, Michigan.

2. The Plaintiff, John Cook, d/b/a Cook's Farm, is a resident of the State of Massachusetts, residing in Charlton, Mass.

3. The Plaintiffs conduct separate businesses in separate States and have no business connections whatever and join together for purposes of this suit only.

4. The Defendant, John R. Block, Secretary of Agriculture of the United States, has an official residence in the District of Columbia.

5. This suit is commenced pursuant to Title 28 of the United States Code, §1331, 1337, and Rule 65 of the Federal Rules of Civil Procedure, Title 28, USC 2201 and seeks to invoke the equity power of the court against the Secretary who has levied a monetary exaction upon the Plaintiffs without legal authority.

6. Venue is claimed pursuant to Title 28 of the United States Code §1391 and is based on the official residence of the Defendant.

II

STANDING

7. The Plaintiffs claim standing justiciability and ripeness because the Defendant, Secretary of Agriculture, is currently demanding of the Plaintiffs monies at the rate of $.50 per cwt. on all retail milk sales made by the Plaintiffs to the consuming public, commencing December 1st, 1983, an action which has had direct and irreparable effect upon the Plaintiffs as alleged hereinafter on account of which the Plaintiffs are in need of immediate relief.

8. Plaintiffs commence this suit as directly affected citizens and taxpayers, whose capital assets have been confiscated without compensation.

III

PLAN OF THE ACT

9. The Act involved herein is the Agricultural Adjustment Act of 1949, as last amended by the Dairy and Tobacco Agricultural Adjustment Act of 1983, 98 Stat. 180, effective December 1, 1983.

10. The plan of that Act is that the Commodity Credit Corporation is given a permanent appropriation of such public funds as may be needed, at §15, USC, §713a-11, et seq. and is required to purchase on the open market manufactured milk products such as cheese and milk powder and butter.

11. The CCC purchases are resold, stored or thereafter gifted to schools, military installations, the poor and needy in the United States, or abroad, or distributed for public policy reasons, (7 USC §1446a).

12. Commencing in 1979-80, the Congress directed the Secretary not only to buy butter, cheese and milk powder available for sale on the open market, but to offer prices higher than market prices.

13. This caused a large transfer of industry inventories to the United States and caused a further rise in milk production to meet the governments unlimited artificial demand.

14. As a result the amount of public monies expended for CCC purchases rose.

15. In response, Congress, in 1983, continued the previous CCC purchase program but made two modifications by the Dairy and Tobacco Agricultural

Adjustment Act of 1983. One was an immediate drop in the mandated prices of the Secretary by $.50 per cwt. (7 USC §1446d(1)(B)); the other was the enactment of a direct monetary levy upon the monetary proceeds of milk "sold commercially" in the amount of $.50 per cwt. ($.01 ± per qt.) (7 USC 1446(d)(2)(A)(i)).

16. This $.50 ($.01 per qt.) monetary levy was deducted from the sales price and required to be paid over by producers of milk to the CCC for in turn direct payment over to other dairy farmers as a reward for not producing milk at all or for producing it in a lesser volume pursuant to a contract with the Secretary, (7 USC 1446(d)(2)(B)).

17. The purpose of the reduction in production funded by the levy was to reduce the CCC purchase volumes and thus reduce the Treasury monetary outlays for the CCC Dairy program.

18. The power claimed by Congress to be exercised for the levy was the commerce power, exercised to fund a public program to reduce milk production and thereby reduce expenditures of public monies for a public program which in turn was enacted pursuant to the national defense and general welfare power. (7 USC 1446(b)).

19. The Act exempts from its coverage the States of Hawaii, Alaska and Puerto Rico.

20. The Act levies no monetary exactions upon any other class of retailers except the Plaintiffs.

21. The Act has penalty provisions requiring a 2400% penalty, (i.e. $.50 per cwt. levy vs. $12.00 per cwt. penalty thereon for failure of the Plaintiffs to remit the levied funds. (7 USC(5)(B)).

22. The Act was passed by a waiver on the floor of Congress of the applicability of Title III of the Budget and Impoundment Act of 1974.

23. The Acts and the legislative history of the Act contains no findings, no committee reports, no debates as to intra commerce vis-a-vis interstate commerce, nor as to any basis at all for the exclusion of Hawaii, Alaska and Puerto Rico or retailers other than the Plaintiffs from the levy or for the inclusion of the Plaintiffs.

IV

THE PLAINTIFFS' COMMERCE

24. The Plaintiffs own cows, lands, processing plants, pasteurizing equipment and delivery trucks and engage in their first and only commercial transaction by the sale of pasteurized milk in consumer packages at retail to consumers at near or on the farm, residing wholly within the state.

25. The Plaintiffs' retail sales and all of their economic activity is wholly intrastate in character.

26. The Plaintiffs, and those who do business as the Plaintiffs, constitute a separate class of marketers who first market their own milk at retail, having entirely separate cost and capital structures in equipment, in plant and delivery and operating programs and are so regarded by government regulatory programs.

V

THE PLAINTIFFS' COMMERCE AND INTERSTATE COMMERCE.

27. The Plaintiffs, and their class of retailers, are small family businesses constituting less than 1% of the milk sales at any level of commerce in their area, state and nation.

28. The Plaintiffs economic activities and their retail sales and prices are not influenced by, nor are they an influence upon, the CCC program of the Secretary.

29. The Plaintiffs' sales do not displace sales that would otherwise be made by other retailers since the Plaintiffs' sales reflect a demand not otherwise existing created by the Plaintiffs' product, resulting from farm and plant practices allowable by total control over land, cows, plant and delivery, resulting in a less contaminated, more natural, fresher and more healthful product, available within one day of milking, appealing to those who are not customers for usual trade milk.

30. The Plaintiffs are not equipped to manufacture cheese, butter or milk products, nor to sell to or buy from the CCC.

31. The Plaintiffs derive no benefit from and have no adverse influence upon interstate commerce in milk or the CCC program.

32. The Plaintiffs' activities are similar to those of their class of intrastate commerce and occur throughout the United States and Puerto Rico.

VI

COMMERCE OF OTHER FARMERS

33. Farmers other than the Plaintiffs in all the various states and Puerto Rico, produce and sell milk after storing it in bulk units on the farm in raw form (for one to three days) to processing plants. The farm milk is picked up by bulk tank trucks who deliver the milk within one to two days to the plant, and that milk (within one to three days) is processed into fluid milk containers and marketed it thereafter (in one to three day cycles) and/or the milk is processed into cheese and milk powder and either sold to the CCC or in competition to those who sell to the CCC.

34. The milk so sold by other farmers is not pasteurized, a long recognized distinction in the market, and accordingly, such milk cannot be and is not sold in competition with the milk of the Plaintiffs and does not so compete.

35. The aforesaid activities of other farmers occur in the states of Hawaii, and Alaska, and the Commonwealth of Puerto Rico. Extensive interstate commerce in milk is exchanged between those states and the remaining states of the United States, some of whom are deficit in milk production and others of whom are surplus in milk production.

36. The economic activities of the Plaintiffs have no impact substantial or otherwise on the other farmers, and the other farmers economic activities have no impact substantial or otherwise on the Plaintiffs, since each do business at entirely different levels and do not compete.

VII

THE EFFECT OF THE LEVY UPON THE PLAINTIFFS

37. The levy is upon a capital asset of the Plaintiffs and reduces the same. It depreciates the value of all of their remaining businesses, investment and capital. It exceeds their ability to pay and confers no benefit. It distributes Plaintiffs' private capital directly to another farmer for public purposes, all without compensation.

38. The Plaintiffs, by reason of their method of doing business, i.e. retailing their own milk, are unable to participate in the reduction program since the economic loss caused by the reduction in the volume of products passing through the processing plant and sales outlets would generate great losses.

39. The levy causes, or will cause, a loss of credit for fixed obligations needed to conduct the businesses, jeopardizes continuation of the Plaintiffs' business and forces the Plaintiffs into a 2400% penalty, further appropriating the capital of the Plaintiffs, without compensation, if they do not pay what they cannot pay.

40. The Plaintiffs' counterparts in Hawaii, Alaska and Puerto Rico have no such levies made upon their sale prices.

VIII

LEGAL OBJECTIONS

41. Congress did not intend the Act to require an appropriation of capital on intrastate retail milk sales of the Plaintiffs or their class.

42. If the provisions of the contested Act be deemed to apply to the Plaintiffs, then Act on its face and/or as applied is contrary to the Constitution of the United States in that without compensation as to the Plaintiffs and/or their class:

A- It directly appropriates their private capital.

B- Transfer that capital to another citizen.

C- For the purpose of reducing public expenditures in the conduct of a general public interest program conducted pursuant to the national defense and general welfare powers.

D- And does so discriminatively and non-uniformly by appropriating only the capital of the Plaintiffs and/or their class, and not that of the general public, nor of other retailers, does not apply in the states of Hawaii, Alaska and the Commonwealth of Puerto Rico which were excepted without legislative findings or legislative history and therefore no evidence other and different than that obtaining in other states was before Congress or exists. No rational basis exists for such non-uniformity and discrimination.

E- Appropriates private capital on account of purely local intrastate commerce sales that do not burden or affect interstate commerce substantially or at all and is irrational.

F- Appropriates private capital without any legislative findings, legislative history, or other evidence of benefit.

G- Appropriates private capital without conferring a benefit upon the Plaintiffs and/or their class other and different that the general public.

43. The Act's appropriation of the Plaintiffs' capital is further in violation of the Fifth and Tenth Amendments to the Constitution and Article I, §9, clauses 4 and 6, and is in excess of the powers conferred at Article I, §8, clauses 1 and 3, and further in violation of the fundamental rights of citizens under our Constitution to be free from appropriation of capital for redistribution to other persons, without compensation, a requirement that demarcates our society from less advanced political and economic totalitarian societies.

44. The Congress in passing the appropriation of private capital exercised a retained legislative veto over the Budget and Impoundment Act of 1974's Title III requirements. This is in violation of the Separation of Powers provisions of the Constitution as recently determined by the Supreme Court.

45. The Act's provision for a 2400% penalty for non-payment is confiscatory of private capital and illegal, i.e. ($12.00 per cwt. penalty vs. $.50 per cwt. assessment), and amounts to an appropriation of a large portion of the sales proceeds.

WHEREFORE, the Plaintiffs pray for an Order and Judgment of the Court declaring the rights hereunder and temporarily, preliminarily and permanently enjoining the Secretary from enforcing the same against the Plaintiffs and/or their class and/or awarding compensation and/or damages therefor, and/or directing return of such monies as have been paid by the Plaintiffs and/or their class, and for such other further and different relief as to the Court seems just and proper.

HARRY TETER JR.

Office and P.O. Address:
Dillon and Teter
1331 Pennsylvania Ave. NW
Suite 905
Washington, DC 20004
Telephone: (202) 393-1313

JOHN BENJAMIN CARROLL, P.C.

Office and P.O. Address:
The White Memorial Bldg.
100 E. Washington St.
Suite 206
Syracuse, NY 13202

APPENDIX C

Constitutional Provisions

Article I—Section 5(2):

[2.] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Article I—Section 7(2) & (3):

[2.] Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that house shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3.] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States;

and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article I—Section 8(1) & (3):
Sec. 8. [Powers of Congress.]:

[1.] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

[3.] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

APPENDIX D

Statutory Provisions

Congressional Budget and Impoundment Control Act of 1974

PUBLIC LAW 93-344; 88 Stat. 297

[H. R. 7130]

An Act to establish a new congressional budget process; to establish Committees on the Budget in each House; to establish a Congressional Budget Office; to establish a procedure providing congressional control over the impoundment of funds by the executive branch; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Short Titles; Table of Contents

Section 1. (a) Short Titles.—This Act may be cited as the "Congressional Budget and Impoundment Control Act of 1974". Titles I through IX may be cited as the "Congressional Budget Act of 1974" and title X may be cited as the "Impoundment Control Act of 1974".

Public Access to Budget Data

Sec. 203. (a) Right to Copy.—Except as provided in subsections (c) and (d), the Director shall make all information, data, estimates, and statistics obtained under sections 201(d) and 201(e) available for public copying during normal business hours, subject to reasonable rules and regulations, and shall to the extent practicable, at the request of any person, furnish a copy

of any such information, data, estimates, or statistics upon payment by such person of the cost of making and furnishing such copy.

Caption: Joint Explanatory Statement of the Committee of Conference: Conference Rpt# 93-924 U.S. Code Congressional and Administrative News Vol. 2; 3591; at 3597.

Section 203. Public Access to Budget Data

The Senate amendment provided for access to copy budget information obtained by the Budget Office from the executive branch and congressional agencies. This right would not apply to certain excepted categories or to information obtained for committees or Members who specifically instructed that such information not be made available to the public.

The conference substitute is substantially the same as the Senate provision. This section provides that the Director of the Congressional Budget Office shall permit the public to copy information obtained from the executive branch or congressional agencies, pursuant to subsections 201(d) and 201(e), respectively. The right of public access and copying is to be subject to reasonable rules and regulations, with the person requesting the information paying the costs. The Budget Office is to maintain an index of available information to facilitate public access. The right of public access does not apply to information specifically exempted from disclosure by law, national defense information, confidential business data, or personnel or medical data. Information obtained by the Budget Office at the request of a committee or Member may not be made available to the public if such committee or Member requests that it not be disclosed.

Appendix D—Statutory Provisions.

Title 2 U.S.C. Sec. 634:

§634. Adoption of first concurrent resolution on the budget prior to consideration of legislation providing new budget authority, new spending authority, or changes in revenues or public debt limit

(a) In general. It shall not be in either the House of Representatives or the Senate to consider any bill or resolution (or amendment thereto) which provides—

(1) new budget authority for a fiscal year;

(2) an increase or decrease in revenues to become effective during a fiscal year;

(3) an increase or decrease in the public debt limit to become effective during a fiscal year; or

(4) new spending authority described in section 401(c)(2)(C) [2 USCS §651(c)(2)(C)] to become effective during a fiscal year;

(b) Exceptions. Subsection (a) does not apply to any bill or resolution—

(1) providing new budget authority which first becomes available in a fiscal year following the fiscal year to which the concurrent resolution applies; or

(2) increasing or decreasing revenues which first become effective in a fiscal year following the fiscal year to which the concurrent resolution applies.

(c) Waiver in the Senate. (1) The committee of the Senate which reports any bill or resolution to which subsection (a) applies may at or after the time it reports such bill or resolution, report a resolution to

the Senate (A) providing for the waiver of subsection (a) with respect to such bill or resolution, and (B) stating the reasons why the waiver is necessary. The resolution shall then be referred to the Committee on the Budget of the Senate. That committee shall report the resolution to the Senate within 10 days after the resolution is referred to it (not counting any day on which the Senate is not in session) beginning with the day following the day on which it is so referred, accompanied by that committee's recommendations and reasons for such recommendations with respect to the resolution. If the committee does not report the resolution within such 10-day period, it shall automatically be discharged from further consideration of the resolution and the resolution shall be placed on the calendar.

(2) During the consideration of any such resolution, debate shall be limited to one hour, to be equally divided between, and controlled by, the majority leader and the minority leader or their designees, and the time on any debatable motion or appeal shall be limited to twenty minutes, to be equally divided between, and controlled by, the mover and the manager of the resolution. In the event the manager of the resolution is in favor of any such motion or appeal, the time in opposition thereto shall be controlled by the minority leader or his designee. Such leaders, or either of them, may, from the time under their control on the passage of such resolution, allot additional time to any Senator during the consideration of any debatable motion or appeal. No amendment to the resolution is in order.

(3) If, after the Committee on the Budget has reported (or been discharged from further consideration of) the resolution, the Senate agrees to the resolution, then subsection (a) of this section shall not apply with respect to the bill or resolution to which the resolution so agreed to applies.

(July 12, 1974, P. L. 93-344, Title III, §303, 88 Stat. 309.)

Joint Explanatory Statement of the Committee of Conference: Conference Rpt# 93-924, U.S. Congressional and Administrative News Vol. 23591, at page 3602:

Section 303. Consideration of Spending, Revenue or Debt Legislation

The House and Senate versions barred consideration of budget authority, revenue, or debt legislation prior to adoption of the first budget resolution for a fiscal year. Both versions exempted advance appropriations (which become available in a year following that to which the budget resolution applies) and the Senate amendment also excepted advance spending authority, social security and 90 percent self-financed trust funds, and advance revenue changes from the prohibition.

The conference substitute prohibits the floor consideration of budget authority, entitlement authority, or changes in revenues or in the public debt limit before the first concurrent resolution has been adopted.

The purpose of holding up entitlement legislation is to enhance the significance of the first budget resolution and

to strengthen congressional control over programs which are difficult to control once the entitlement has been enacted.

The conference substitute permits the consideration of advance appropriations and advance revenue changes prior to adoption of the first budget resolution for the fiscal year to which they apply.

The conference substitute contains a procedure for the waiver of the prohibition in the Senate. Taken from the Senate amendment, the provision allows Senate consideration before adoption of the budget resolution of a spending, revenue, or debt measure if the committee which reported the measure reports a resolution of waiver which is referred to the Senate Budget Committee and subsequently approved by the Senate.

Title 2—Sec. 637:

§637. Budget Committee handling of legislation dealing with Congressional budget

No bill or resolution, and no amendment to any bill or resolution, dealing with any matter which is within the jurisdiction of the Committee on the Budget of either House shall be considered in that House unless it is a bill or resolution which has been reported by the Committee on the Budget of that House (or from the consideration of which such committee has been discharged) or unless it is an amendment to such a bill or resolution.

(July 12, 1974, P. L. 93-344, Title III, §306, 88 Stat. 313.)

Appendix D—Statutory Provisions.

Joint Explanatory Statement of the Committee of Conference: U.S. Congressional and Administrative News; Vol. 2 pp. 3591, 3603, P.L. 93-344:

Section 306. Budget Committee Jurisdiction

This section, similar to provisions in both the House and Senate versions, provides that a matter within the jurisdiction of a Budget Committee may be considered only if it has been reported from that committee, if it is an amendment to a bill or resolution reported by the Budget Committee, or if the committee has been discharged from its consideration.

DL—93-344, 88 Stat 298 Sec. 904(2):

Exercise of Rulemaking Powers

Sec. 904. (a) The provisions of this title (except section 905) and of titles I, III, and IV and the provisions of sections 606, 701, 703, and 1017 are enacted by the Congress—

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

(b) Any provision of title III or IV may be waived or suspended in the Senate by a majority vote of the Members voting, a quorum being present, or by the unanimous consent of the Senate.

(c) Sections 305(b)(2) and 306 of this Act may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members, duly chosen and sworn.[35]

(d) Appeals in the Senate from the decisions of the Chair relating to any provisions of title III or IV or section 1017 shall, except as otherwise provided therein, be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the resolution, concurrent resolution, reconciliation bill, or rescission bill, as the case may be.

Joint Explanatory Statement of the Committee of Conference U.S. Code Congressional and Administrative News, Volume 2; 93rd Congress; Second Session; 1974 pp. 3591-3615:

Section 904. Rulemaking Powers

The House and Senate versions provided that the rules established for the congressional budget process and certain other provisions are an exercise of the rulemaking powers of the House and Senate and may be changed by either as it desires. The Senate amendment also provided for the waiver or suspension in the Senate of any rules in Titles III and IV by majority vote, and for a one-hour limit on appeals from the ruling of the chair.

Appendix D—Statutory Provisions.

The conference substitute retains, with conforming changes, the provisions of the House bill and Senate amendment relating to the rulemaking powers of the House and Senate. The conference substitute adopts subsections (b) and (c) of the Senate amendment relating to Senate rules.

Title I Dairy and Tobacco Adjustment Act of 1983 P.L. 98-180 Nov. 29, 1983, 97 Stat. 1128, U.S.C. 1446(a), at Section 102(2); (d)(2)(2)(i)(ii)(B) & (C):

"(2)(A)(i) Effective for the period beginning with the first day of the first calendar month following the date of enactment of the Dairy Production Stabilization Act of 1983 and ending on March 31, 1985, to encourage the adjustment of milk production of levels consistent with the national demand for milk and the products of milk, the Secretary shall provide for a reduction of 50 cents per hundredweight to be made in the price received on all milk produced in the United States and marketed by producers for commercial use.

"(ii) Effective for the period beginning with the date of enactment of the Dairy Production Stabilization Act of 1983 and ending on the last day of the month of enactment of such Act, the provisions of paragraphs (2) through (7) of subsection (d) of this section, as in effect on the day immediately prior to the date of enactment of the Dairy Production Stabilization Act of 1983, shall be applicable to all milk produced in the United States and marketed by producers for commercial use. Enactment of the Dairy Production Stabilization Act of 1983 shall not

affect in any manner the collection or enforcement of any deduction from the price of milk previously implemented by the Secretary under this subsection as in effect for any milk marketed for commercial use prior to the effective date of the reduction provided for in this paragraph, as added by section 102(a) of the Dairy Production Stabilization Act of 1983.

"(B) The funds represented by the reduction in the price required to be applied to the marketings of milk by a producer under subparagraph (A) shall be collected and remitted to the Commodity Credit Corporation, at such time and in such manner as prescribed by the Secretary, by each person making payment to a producer for milk purchased from the producer, except that in the case of a producer who markets milk of the producer's own production directly to consumers, such funds shall be remitted directly to the Corporation by the producer.

"(C) To the extent that funds collected under this paragraph are inadequate to make the payments to producers who reduce marketings under paragraph (3), such payments shall be made using funds otherwise available to the Corporation. The funds remitted to the Corporation under this paragraph shall be considered as included in the payments to a producer of milk for purposes of the minimum price provisions of the Agricultural Adjustment Act of 1933, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

Appendix D—Statutory Provisions.

Title 2, U.S.C. Secs. 101, 102

Title 2 USC Sec. 101 Enacting clause:

The enacting clause of all Acts of Congress shall be in the following form: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."

(July 30, 1947, ch 388, §1, 61 Stat. 634.)

Title 2 USC Sec. 102 Resolving clause:

The resolving clause of all joint resolutions shall be in the following form: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled."

(July 30, 1947, ch 388, §1, 61 Stat. 634.)

APPENDIX E

Letter from Hawaii Department of Agriculture showing Hawaii part of mature milk market

(Logo)

George R. Ariyoshi
Governor

Jack K. Suwa
Chairperson, Board of Agriculture

Suzanne D. Peterson
Deputy to the Chairperson

State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 So. King Street
Honolulu, Hawaii 96814-2512

Mailing Address:
P.O. Box 22159
Honolulu, Hawaii 96822-0159

January 31, 1986

Mr. John Benjamin Carroll, P.C.
Suite 206
100 E. Washington Street
Syracuse, New York 13202

Dear Mr. Carroll:

Thank you for your letter of January 22, 1986 requesting data on dairy imports to Hawaii.

The State of Hawaii imports practically all of its butter, cheese, and powder needs since there is no manufacturing of these products except limited recovery of cream from the local processing plants (handlers). It is also estimated that approximately 10% of the fluid milk is imported to meet local market needs.

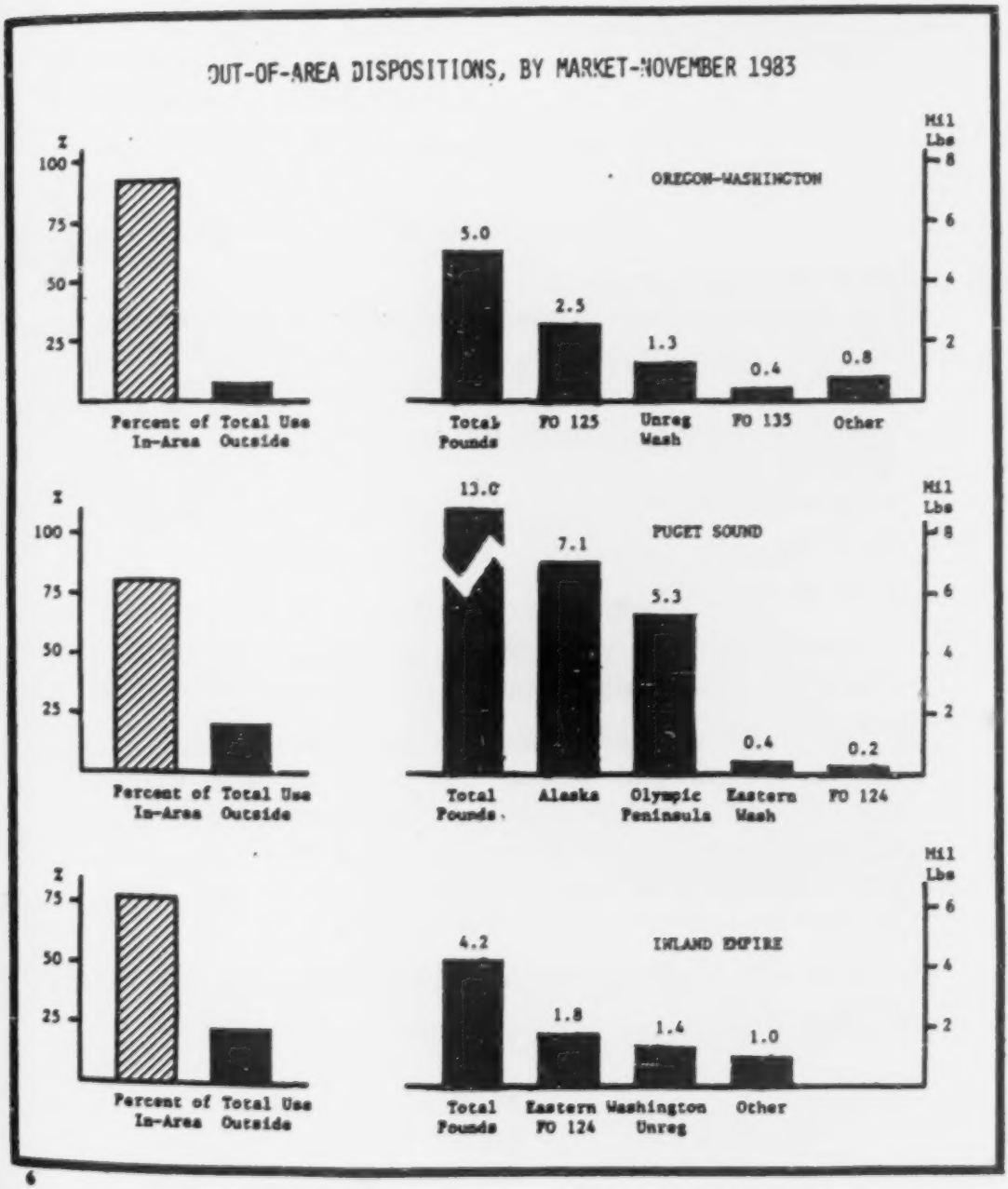
If we can be of further assistance, please feel free to write.

Sincerely,

ROBERT T. YARA
Robert T. Yara
Assistant Milk Commissioner

APPENDIX F

Statistics of the Federal Milk Market Administration showing that the State of Alaska is a part of the national milk market



Appendix F—Statistics of the Federal Milk Market Administration showing that the State of Alaska is a part of the national milk market.

MOVEMENTS OF FLUID MILK PRODUCTS FROM REGULATED HANDLERS, PRODUCER-HANDLERS, AND NONPOOL PLANTS IN THE PUGET SOUND AREA TO ALASKA

Year	*June*	*November*
1971	1,377,127	2,319,188
1972	1,266,758	2,018,145
1973	1,193,088	1,618,891
1974	1,227,784	2,274,839
1975	1,065,726	1,267,946
1976	2,918,314	3,422,717
1977	2,512,054	4,108,513
1978	3,719,345	4,222,790
1979	4,127,789	4,862,996
1980	4,321,804	4,855,746

APPENDIX G

Finding by Congress that the market for milk is a national market

The Dairy and Tobacco Adjustment Act of 1983 D1498-180 June 29, 1983 97 Stat. 1128; 7 USC 1446 (a)(6).

> "(6) The term 'United States' as used in paragraphs (2) and (3) of this subsection means the 48 continguous states of the United States."

Appendix G—Finding by Congress that the market for milk is a national market.

Senate Report # 98-163-1983 to Dairy and Tobacco Adjustment Act of 1983

TABLE 3.—LEADING STATES, MILK PRODUCTION, 1976, 1980, AND 1983—Continued

State	1976		1980		1983	
	Million pounds	Percent [1]	Million pounds	Percent [1]	Million pounds	Percent [1]
Ohio	4,435	4	4,310	3	4,590	3
Iowa	3,954	3	4,188	3	4,301	3
Texas	3,389	3	3,825	3	3,778	3
Missouri	2,919	2	2,890	2	2,985	2
Washington			2,542	2	3,222	2
Total (11 States)	78,888	65	87,693	66	92,581	68
Total, United States	120,180	100	128,523	100	135,795	100

[1] Of U.S. total.

(c)

The dairy manufacturing industry, like dairy farming, has undergone substantial structural change. In the past 3 decades, there has been a rapid decline in the number of plants producing dairy products, except those producing Italian cheese. In contrast to the general decline in number of plants, output per plant has trended upward. For example, the average plant production of American cheese was about ½ million pounds in 1950 compared with 6 million pounds in 1982.

The trend has also been toward fewer and larger processing plants in the fluid milk sector. The number of fluid milk plants declined from 6,726 in 1955 to 1,066 in 1980. Meanwhile, the average output per plant increased from 6.5 million pounds per year in 1955 to over 47 million pounds in 1980 (product weight basis).

Regional dairy cooperatives have become increasingly important in the procurement, processing or manufacturing, and distribution of milk and dairy products. Consolidation and merger of cooperatives has enabled them to achieve increased prominence in the marketplace. Their role in procuring, assembling, and coordinating a fluctuating milk supply with a variable demand has increased, and the regional cooperatives have consolidated manufacturing facilities—especially cheese plants.

Per capita civilian consumption of dairy products, on a milk equivalent basis declined from 653 pounds in 1960 to 544 pounds in 1974 and then increased slightly to 559 pounds in 1979 (Table 4). Shifts have occurred in per capita consumption among principal dairy products. Substantial decreases occurred in butter, cream, and plain whole milk between 1960 and 1980. During the same period consumption of low fat milk and cheese increased substantially.

TABLE 4.—PER CAPITA CIVILIAN CONSUMPTION, 1960–81

Year	All dairy products [1]	Fluid, whole milk	Lowfat milks [2]	Butter	Cream	Low fat cheese
1960	653	251	20.8	7.5	8.3	8.4
1961	641	242	22.3	7.4	8.1	8.6
1962	642	241	24.3	7.3	7.8	9.1
1963	632	240	26.8	6.9	7.5	9.2
1964	632	239	29.4	6.9	7.1	9.4

Appendix G—Finding by Congress that the market for milk is a national market.

DAIRY AND TOBACCO ADJUSTMENT

P.L. 98-180
[page 12]

TABLE 4.—PER CAPITA CIVILIAN CONSUMPTION, 1960–81—Continued

Year	All dairy products[1]	Fluid whole milk	Lowfat milks[2]	Butter	Cheese	Ice cream
1965	629	237	31.7	6.4	6.9	9.5
1966	604	234	33.7	5.7	6.6	9.8
1967	581	224	37.6	5.5	5.1	10.1
1968	577	219	42.6	5.7	5.8	10.6
1969	569	212	47.9	5.4	5.5	10.9
1970	562	207	51.3	5.3	5.3	11.5
1971	558	200	56.6	5.1	5.3	12.1
1972	561	196	62.5	4.9	5.3	13.2
1973	555	188	67.9	4.8	5.4	13.7
1974	544	177	70.9	4.6	5.5	14.6
1975	546	173	77.7	4.8	5.5	14.5
1976	548	166	82.2	4.4	5.5	15.8
1977	550	157	87.1	4.4	5.5	16.4
1978	556	153	88.9	4.5	5.5	17.2
1979	559	147	92.5	4.6	5.6	17.6
1980	544	141	96.3	4.5	5.7	18.2
1981	543	135	98.4	4.3	5.8	19.6

[1] On a milk fat equivalent basis.
[2] Includes skim milk, 1-percent, and 2-percent.

(d)

Government participation in milk pricing arrangements began in the early 1930's. In 1982, about 69 percent of all milk sold to plants and dealers and about 81 percent of the fluid grade deliveries in the United States were regulated by Federal milk orders. Federal milk orders are part of a broad program of marketing agreements and orders authorized by the Agricultural Marketing Agreement Act of 1937. Under this authority the Secretary of Agriculture is empowered to help stabilize market conditions by issuing Federal orders which apply to handlers of milk and its products. In its simplest terms, a milk marketing order is a legal instrument issued to provide the ground rules for transactions between farmers and buyers of grade A milk in a specified geographic area.

At the present time, there are 46 Federal milk orders in effect. The Federal order program has been in effect since 1938 and has experienced steady growth over the years. In 1982, about 91.6 billion pounds of milk were regulated under Federal orders compared with 19 billion pounds of milk in 1950. In addition, 15 States now have authorized regulation of milk prices to producers, and 13 States are authorized to regulate wholesale or retail prices. In total, more than 95 percent of the milk meeting sanitary standards for fluid use is priced under either Federal or State orders.

(e)

The Federal dairy price support program supports the national average price received by farmers for manufacturing milk. The price support program is administered by the Agricultural Stabilization and Conservation Service, U.S. Department of Agriculture, and is carried out under authority of the Agricultural Act of 1949, as amended. In carrying out the program, the Commodity Credit Corporation (CCC) offers to buy butter, natural Cheddar Cheese,

Appendix G—Finding by Congress that the market for milk is a national market.

LEGISLATIVE HISTORY

P.L. 98-180
[page 13]

and nonfat dry milk at announced prices. The prices are designed to result in U.S. average prices to producers at least equal to the announced support price. Thus, when necessary, CCC removes milk from the market in the form of those dairy products which cannot be sold in commercial channels at prices corresponding to the support prices for manufacturing milk. These products are stored and then sold commercially at a later date, donated to schools and other specified institutions, or donated overseas.

DAIRY PROGRAM OPERATION

Federal programs have been deeply imbedded in the economic fabric of the United States dairy industru for more than 40 years. During this time, the economic characteristics and performance of the industry have changed considerably. Although the basic structure of Federal dairy programs is largely unchanged, there have been changes within Federal programs to adapt to changes in the dairy economy.

There are four clearly interrelated Federal programs involved:

1. The dairy price support program which explicitly puts a floor under the price of manufacturing grade milk and thus maintains a floor under all milk prices.
2. The milk marketing order program which establishes minimum prices for fluid grade milk in most parts of the country.
3. Import controls which protect the price support program and keep the U.S. Government from supporting world milk prices.
4. Federal cooperative policy which encourages the development of farmer-owned cooperatives but provides they may not use their market power to raise prices excessively.

The thrust of these dairy programs has been to deal with the level of milk prices and with problems of instability in milk prices and dairy farm incomes.

For many years, the dairy price support program successfully fulfilled its goal of providing adequate supplies of wholesome and nutritious fluid milk and dairy products at reasonable prices to the consumer and at minimum cost to the taxpayer. However, recent years have seen milk production far outpace demand, leaving the Government to purchase unacceptable and increasing amounts of surplus dairy products.

The cost of the price support program has grown from $250 million in 1979 to more than $2.2 billion in 1982. Expenditures for fiscal year 1983 could reach nearly $2.7 billion (Table 5). These unprecedented expenditures have left the Government owning a huge and growing surplus of dairy products. As of April 1, 1983, the CCC owned 430 million pounds of butter, 758 million pounds of cheese, and 1.2 billion pounds of nonfat dry milk for thich there is little market.

APPENDIX H

Finding by Congress that the levy was in aid of a national milk program

LEGISLATIVE HISTORY P.L. 98-180

[page 57]

Members of the panel supported the Federation plan, pointing out that compliance is voluntary, and that a farmer would not be affected by maintaining production at his base level. They also said that the program would be simple to implement and would take about 2 or 3 months to put into place.

The bulk of Mr. Kirkpatrick's testimony addressed the National Dairy Promotion Program. He pointed out that the mandatory nature of the 15-cent assessment was reasonable and necessary in light of the failure of past voluntary programs. Since all dairymen benefit from product promotion, all should be made to bear the cost equally.

In addressing the value of promotion, Mr. Kirkpatrick referred to a USDA Economic Research Service study. In a May 1972-73 study period, it was determined that a $12 million expenditure nationally would have increased cheese consumption 244 million pounds annually; and a promotion program costing $18 million would have raised butter sales by 450 million pounds milk equivalent.

The second panel of witnesses included Albert McDonald, Alabama Commissioner of Agriculture and Industries; Bucky Jones, Dairymen, Inc., Smithdale, Mississippi; William Boardman, Dairy Farmers, Inc., Orlando, Fla.; Herbert L. Forest, Alabama Farm Bureau Federation, Montgomery, Alabama; and Richard Trawick, Southern Milk Sales, Inc., Montgomery, Alabama.

Members of this panel were also unanimous in their opposition to the assessment, which Mr. Jones labeled a "tax." They also called the incentive program to reduce production a "crash" program that would have a number of adverse consequences. First, according to Mr. McDonald, it would result in a large dispersal of cull cows, thus depressing cattle prices. Second, it would not result in any increased consumption, since it would not reduce consumer prices. Third, and most importantly, there was a serious concern voiced by these Southeast representatives that the Dairy Compliance Program would result in a drying up of local milk produced to supply the fluid market. Possible shortages in some areas of the country, such as the South, would create the necessary of shipping large volumes of class I fluid milk from the upper Midwest to these regions of shortage. As a result, consumers in the southern regions would face an increase in price for fluid milk ranging from 15 to 35 cents per gallon in the supermarket.

Members of this panel backed a plan with three features. First they supported a $1 reduction in the support price. Mr. Boardman added that the Secretary should be authorized to reduce the support price an additional 50 cents if necessary. Second, they advocated a freeze, or at least some floor price, on the price of class I fluid milk. This would be to avoid any local shortages of fluid milk and prevent the necessity of shipping costs. Third, Mr. McDonald said the plan should include the establishment of a formula, allowing the Secretary to raise or lower the support price based on the anticipated Commodity Credit Corporation purchase of dairy stocks.

All members of the panel agreed that the price-cut plan would be simple. Mr. Boardman gave a historic analysis, showing that cuts in the support price have previously led to lower production and lower CCC purchases, thus cutting government costs.

Appendix H—Finding by Congress that the levy was in aid of a national milk program.

DAIRY AND TOBACCO ADJUSTMENT P.L. 98-180
[page 58]

A third panel, also uniformly opposed to a base plan and favoring a price support reduction plan, was comprised of Steve Conerly, President, Dairy Division, Pet, Inc.; Ben Zarda, President, Zarda Brothers Dairy, Inc., Shawnee, Kan.; E. Linwood Tipton, Senior Vice President, Milk Industry Foundation/International Association of Ice Cream Manufacturers; Donald Randall, National Independent Dairy-Foods Association; and John Benjamin Carroll, Dairy Farmers Distributors, Chitenango, N.Y.

Mr. Tipton called for a $1 reduction in the support price plus authority for an additional 50-cent reduction if necessary. He said such a program would reduce CCC purchases from the present 15.4 billion pound level to about 7.7 billion pounds in fiscal year 1984 and to about 4.1 billion pounds in fiscal year 1985. At that point, CCC net costs would be about half a billion dollars. He supported a branded promotion campaign, as opposed to nonbrand advertising, and called for use of CCC funds to partially reimburse public institutions especially schools to increase the utilization of dairy products.

In addition to opposing base or quota plans, Tipton also opposed the idea of increasing the minimum total solids content of fluid milk because there is no evidence suggesting that would in fact increase milk consumption.

Mr. Zarda endorsed the same price support reduction scheme, and said that a $1.50 lower milk price would save consumers $1.8 billion a year while increasing dairy sales and decreasing the surplus. Mr. Zarda opposed any new system of dairy bases, quotas and/or paid diversions as being very complicated and requiring more regulation and more bureaucracy which is not needed.

Mr. Randall called for the $1 price support reduction, and advocated giving the secretary authority to reduce the price support an additional $1 if surpluses exceed 4 billion pounds in any 12-month period. He opposed the production reduction incentive plans because "dairy farmers, like small businessmen, must be held accountable for over-production mistakes. They must meet the standard of reasonable and prudent decisionmaki.. "

Testifying on the first panel of the afternoon session were James Graham, North Carolina Commissioner of Agriculture; Jim Rikert, Agri-Mark, Inc.; Pat Patterson, Green Mountain Federation, Barre, Vermont; Paul Stone, Orwell, Vermont; Phil Nyberg, League of California Milk Producers; and Fred Duoma, Milk Producers Council and the Southern California Dairy Association, Ontario, Ca.

Mr. Graham told the subcommittee they faced a tough task, that he had no specific proposal, but that the assessment was "clearly the wrong approach to the problem, and the end result may well be the long-term decline of the dairy industry in many sections of the country." In coming up with a dairy proposal, he said, the Committee will have to look at regional and local imbalances in production and consumption. "If you force all producers to reduce production, you will not be fair because not all areas have surpluses of products. The price support level may be adjusted since regional and area differences in production and demand can be balanced by market influences."

Other panel members were in sharp disagreement. Mr. Stone advocated a paid diversion program similar to the payment-in-kind